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HOLMES ON 'PEERLESS': *RAFFLES V. WICHELHAUS* AND THE OBJECTIVE THEORY OF CONTRACT†

Robert L. Birmingham*

The familiar case Raffles v. Wichelhaus is ordinarily read subjectively: the minds of the parties do not meet hence the parties do not contract. Holmes sought to explain Raffles objectively, and is widely thought to have failed. The ground of Holmes' explanation is that the parties, by saying 'Peerless', not merely meant different things, but said different things. In support of Holmes' explanation, Professor Birmingham distinguishes syntactical, that is physical, linguistic properties from semantical such properties, those based on reference or meaning. Holmes, as Professor Birmingham understands him, does not need recourse to meanings, and would have contract depend only on the coreference of the language of the parties, not on the correspondence of their language or thought.

Early in Lecture IX of *The Common Law*, Holmes described *Raffles v. Wichelhaus*:¹

The defendant agreed to buy, and the plaintiff agreed to sell, a cargo of cotton, 'to arrive ex Peerless from Bombay.' There were two such vessels sailing from Bombay, one in October, the other in December. The plaintiff meant the latter, the defendant the former. It was held that the defendant was not bound to accept the cotton.²

Raffles is interesting as an intellectual puzzle and as currently respected law.³ Also, as "that darling of first-year students,"⁴ it is a familiar case that we should get right.

Holmes continued:

It is commonly said that such a contract is void, because of mutual mistake of the subject-matter, and because therefore the parties did not consent to the same thing. But this way of putting it seems to me misleading. The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their

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1. 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

2. O.W. HOLMES, *THE COMMON LAW* 309 (1881).

3. For instance, in *Flower City Painting Contractors, Inc. v. Gumina Constr. Co.*, 591 F.2d 162 (2d Cir. 1979), a contractor and his subcontractor differently understood the latter's painting duties, neither party, as the formula goes, suspecting or having reason to suspect this difference. The court on the authority of "the famous 'Peerless' case" decided "no enforceable contract ever came into existence." *Id.* at 165, 166.

4. Kaplan, *Encounters with Holmes*, 96 HARV. L. REV. 1828, 1834 (1983).

conduct.⁵

No surprises: Hart observes, objectivity was "something of an obsession" with Holmes.⁶

Holmes read *Raffles* objectively:

If there had been but one "Peerless," and the defendant had said "Peerless," by mistake, meaning "Peri," he would have been bound. The true ground of the decision was not that each party meant a different thing from the other, but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.⁷

Superficially, the passage is unsettling. As Eisenberg remarks, it seems "Holmes had it precisely backward."⁸ Surely, *Raffles* and *Wichelhaus* said 'Peerless' identically; yet Holmes apparently denied they did.

We turn for instruction to Gilmore's elegant *The Death of Contract*.⁹ Kaplan's casual comment that Gilmore there "had some legitimate sport with Holmes and the *Peerless*"¹⁰ signals the authority of Gilmore's view: the legal literature assumes its correctness. Gilmore dismissed Holmes' exegesis of *Raffles* as an episode of Holmes' efforts—which Gilmore said attained "instant and spectacular success"¹¹—to replace the then current subjective theory of contract formation with the objective theory.

A first pass at the competing theories gives:

Subjective Theory: There is a contract if and only if the minds of the parties meet.

Objective Theory: There is a contract according only to the outward manifestations of the parties.

The objective theory may be restated more awkwardly, but congruently with the statement of the subjective theory: 'There is a contract if and only if the manifestations (not the minds) of the parties meet'.

Although Gilmore's Holmes was "willing to accept *Raffles* as a correctly decided case," he "insisted that it must be explained 'objectively.'"¹² Gilmore described Holmes' *Raffles* as "altogether aston-

5. O.W. HOLMES, *supra* note 2, at 309.

6. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 242 (1968).

7. O.W. HOLMES, *supra* note 2, at 309.

8. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1123 (1984).

9. G. GILMORE, THE DEATH OF CONTRACT 18 (1974).

10. Kaplan, *supra* note 4, at 1834.

11. G. GILMORE, *supra* note 9, at 18.

12. *Id.* at 42.

ishing" and "an extraordinary tour de force";¹³ Gilmore added, the "magician who could 'objectify' " *Raffles* "could, the need arising, objectify anything."¹⁴ We may summarize Gilmore's contentions, interpretable as impugning the integrity of Holmes' scholarship, thus: Holmes wanted contract law to be objective; *Raffles* cannot be interpreted objectively; Holmes, perhaps disingenuously, just declared that *Raffles* can be interpreted objectively, and moved on.

Gilmore explained Holmes' passage implausibly. First, Gilmore, who had no qualms about calling Langdell, for instance, "stupid," conceded Holmes was not, so we may concede this too.¹⁵ Then consider an argument originating with Aristotle, which we treat in the form given it by Tertullian (c. 160-c. 220). Tertullian, although a theologian, was thought, perhaps falsely, to have been trained in Roman law, as were many Church Fathers. Tertullian defended the dogma that Christ was incarnate by arguing somewhat effectively that at least it was not fabricated, it being so implausible that anybody fabricating a dogma would choose a different, more believable, dogma.¹⁶ The position Gilmore attributed to Holmes regarding *Raffles* is transparently false. It is, consequently, unlikely to have been Holmes' position: Holmes, although he might have been wrong, would not have been transparently wrong; and it is improbable that he disingenuously argued such a weak case.

I.

Gilmore, while discussing consideration, not formation, but speaking generally, contended that Holmes "was not in the least interested in stating or restating the common law as it was."¹⁷ According to Gilmore, Holmes' thesis was entirely normative, not partly descriptive, roughly: 'Contract law *should* be objective (regardless of whether actually it is objective)'.

By Holmes' objective theory, whether parties contract depends only on observables. Gilmore stated thus its consequent advantages over the subjective theory it replaced.

13. *Id.* at 40, 41.

14. *Id.* at 41.

15. G. GILMORE, *THE AGES OF AMERICAN LAW* 42, 56 (1977).

16. Sider, *Credo Quia Absurdum?*, 73 *CLASSICAL WORLD* 417 (1980). For the view that there were two Tertullians, the other one a jurist, see Martini, *Tertulliano Giurista e Tertulliano Padre della Chiesa*, 41 *STUDIA ET DOCUMENTA HISTORIAE ET IURIS* 79 (1975).

17. G. GILMORE, *supra* note 9, at 20.

Now, if you accept the result of a case, what difference does it make how you explain the result? In this context I think that it makes a good deal of difference. If ("in contract, as elsewhere") the "actual state of the parties' minds" is relevant, then each litigated case must become an extended inquiry into what was "intended," "meant," "believed" and so on. If, however, we can restrict ourselves to the "externals" (what the parties "said" or "did"), then the factual inquiry will be much simplified¹⁸

Here is Gilmore commenting on how Holmes reconciled the case law:

[He] made industrious use of whatever bits and pieces of case law, old and new, could be made to fit the theory. Such cases were immediately promoted to "leading cases" and made to fit—in much the same way that Procrustes made his guests fit. Cases which could not be made to fit were ignored or dismissed, with Langdellian certitude, as "wrong."¹⁹

Therefore, according to Gilmore, Holmes puts cases into two categories: "leading cases" . . . made to fit"; and cases "ignored or dismissed . . . as 'wrong.'"²⁰

If, as Gilmore said, Holmes was not interested in restating the common law, Holmes would not have tested his theory against the cases. Also, if we accept Gilmore's interpretation of Holmes on *Raffles*, by which Holmes did not come close to making the case fit the objective theory, Holmes miscategorized the case; if it could not be made to fit, Holmes would have more properly ignored it or dismissed it as wrong.

Holmes' thesis is better interpreted to have a descriptive component besides its normative component, being something like: 'Contract law *is* objective (which is a good thing)'. This thesis, but not Gilmore's version, would have motivated Holmes to show that his theory reconciles the case law at least as well as does the subjective theory.

Holmes, trying to show contract law *is* objective, practiced science, exactly as Langdell prescribed.²¹ Cases were data (observa-

18. *Id.* at 42 (quoting O.W. HOLMES, *supra* note 2, at 309).

19. *Id.* at 17-18.

20. *Id.* at 42.

21. Langdell "believed that law was a science, like any other science." *Id.* at 12. Gilmore probably intended to attribute unscientific behavior to Holmes by the passage quoted *supra* text accompanying note 19; at least he was mocking gently. But Holmes was not doing normal science. And physical scientists, in times of paradigm shift, likewise behave in ways a layperson would consider outrageous. See, e.g., Earman & Glymore, *The Gravitational Red Shift as a Test of General Relativity: History and Analysis*, 11 *STUD. HIST. & PHIL. SCI.* 175 (1980); Pickering, *Against Putting*

tions); Holmes constructed legal rules (laws) to explain them. Ordinarily, a scientific theory neither explains nor is consistent with all the data. If simple, elegant, or useful, it can get observations wrong without disqualifying itself; we regard nonconforming data as misspecified, or resulting from random perturbations not invalidating the theory. Newton explained most planetary motion by gravity; he attributed the rest, however, to "interference by angels."²² Could Holmes have said a case seemingly requiring the subjective theory is wrong, the judges being equivalent in law to angels in Newtonian physics?

Not if the case is *Raffles*, as is evident from Holmes' footnote to the passage about *Raffles*. The footnote reads: "*Raffles v. Wichelhaus*, 2 H. & C. 906. Cf. *Kyle v. Kavanaugh*, 103 Mass. 356, 357."²³ The Supreme Judicial Court of Massachusetts, before which Holmes practiced while writing *The Common Law*, had decided *Kyle* in 1869, twelve years before Holmes published. In *Kyle*, "the Massachusetts court came out exactly the same way the English [*Raffles*] court had and put the result expressly on the ground that the minds of the parties had not met."²⁴ The litigants in *Kyle* agreed about the sale of property described as "on Prospect Street" in Waltham.²⁵ Their description failed as a definite description, however, there being two Prospect Streets in that town. Holmes' footnote cited to a part of the trial court's charge to the jury that the supreme judicial court sustained on appeal, which instructed: "[I]f the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to the subject matter of the sale, they could not be said to have agreed and to have made a contract."²⁶

Gilmore offered *Raffles* and *Kyle* as "exhibit[s] to prove that the courts, well past the midpoint of the nineteenth century, were approaching the problem of formation of contract from a purely subjectivist point of view."²⁷ Imagine, as did Gilmore, that *Kyle* and *Raffles* are explanatory successes of the pre-Holmesian subjective theory.

the Phenomena First: The Discovery of the Weak Neutral Current, 15 STUD. HIST. & PHIL. SCI. 85 (1984).

22. Scriven, *Explanation and Prediction in Evolutionary Theory*, in MAN AND NATURE 213, 214 (R. Munson ed. 1971).

23. O.W. HOLMES, *supra* note 2, at 242 n.1.

24. G. GILMORE, *supra* note 9, at 40.

25. *Kyle v. Kavanaugh*, 103 Mass. 356, 356 (1869).

26. *Id.* at 357.

27. G. GILMORE, *supra* note 9, at 39.

They must have been significant cases for Holmes: both relatively recent, one prestigiously English, the other decided in that leading American jurisdiction that comprised the community Holmes expected to evaluate his work in the first instance. If his thesis was partly intended to be descriptive, if he had some interest in reconciling cases to theory, Holmes could not persuasively substitute for the subjective theory an objective theory that failed to explain, and explain well, *Kyle* and *Raffles*.

II.

As a reference point, imagine a pathologically objective theory of contract, which Holmes would have adopted if he could have reconciled *Raffles* with it. We may build such an objective theory beginning with the *Restatements of Contracts*. Both *Restatements* give the genus of contract thus:

Definition (in part): A contract is a promise or a set of promises.²⁸

The definition is Williston's. Contracts might be entities other than promises, that are caused by or arise from promises. Cook complained that we should separate "the 'factual events' (the promises)" from "the resulting 'legal relations' attached by the law to the promises."²⁹

Definition (in part): A promise is a manifestation.³⁰

This is the second *Restatement*, not the first.³¹ We have a classic equivocation. A manifestation may be a manifesting: an act. Or it may be a manifested: what the act indicates, its content. Kant equivocated this way, over 'representation' (*Vorstellung*).³² *Restatement Second* adopts manifestings: "'Promise' . . . denotes the act of the

28. RESTATEMENT OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

29. Cook, *Williston on Contracts*, 33 ILL. L. REV. 497, 501 (1939).

30. RESTATEMENT (SECOND) OF CONTRACTS § 2(a) (1981).

31. In terms of the equivocation indicated in the text *infra*, the original *Restatement* had it both ways. Section 2(1) said a "promise is an undertaking," thereby suggesting promises are manifested; however, its comment a hedged: "'promise' means both physical manifestations by words or acts of assurance and the moral duty to make good the assurance by performance." RESTATEMENT OF CONTRACTS § 2 comment a (1932).

32. Sellars, *Some Remarks on Kant's Theory of Experience*, 64 J. PHIL. 633, 633 (1967). Such equivocation is not confined to Kant or to German metaphysics. See, e.g., 1 S. ALEXANDER, SPACE, TIME, AND DEITY 11-13, 16-26 (1920).

promisor."³³

Imagine we write 'Williston' twice, and ask, 'How many words have we written?' The question equivocates, its answer being 'One' if word types (patterns) are intended, 'Two' if word tokens (exemplifications) are intended.³⁴ The *Restatements*' manifestations are tokens: physical particulars (noises or inscriptions). Consequently, contracts, according to this objective theory, are sets of noises or inscriptions. Murray decides otherwise:

Frequently the word "contract" is used to refer to the written memorial (the signed writing) or other utterance that evidences a legally enforceable promise or group of promises. The writing is not the contract; the words the parties use if they contract orally is [*sic*] not the contract . . . All these manifestations are mere *evidence* of the contract. Where is the contract? One cannot touch, hear, smell or feel the contract.³⁵

But by this objective theory, a contract *is* something we can "hear" if it is oral, and "touch" or "feel" it if it is written. Ordinarily, though, a contract doesn't smell much.³⁶

Only some promises are contracts. Which? According to the *Restatements*, those "for the breach of which the law gives a remedy."³⁷ Well, we know *that*. But whether the law gives a remedy is what we are using the concept of contract to *decide*. A theory of contract specifies sentence tokens or sets of sentence tokens that are contracts. A model for a theory of contract is a grammar—a theory specifying which linguistic sequences are well-formed.³⁸

Think of a linguistic token (expression), for example,

Holmes.

Among its properties are those belonging only to expressions, and relating only to inspectable characteristics of them: its syntactical properties. The specification of a syntactical property "makes no ref-

33. RESTATEMENT (SECOND) OF CONTRACTS § 2 comment a (1981).

34. The distinction is Peirce's. Letter from Charles Sanders Peirce to Lady Welby (Oct. 12, 1904), reprinted in 8 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 8.334 (1958), also reprinted in SEMIOTICS AND SIGNIFICS: CORRESPONDENCE BETWEEN CHARLES S. PEIRCE AND VICTORIA LADY WELBY 22, 32-33 (C. Hardwick ed. 1977).

35. J. MURRAY, *Introduction to CASES AND MATERIALS ON CONTRACTS* 3-4 (3d ed. 1983).

36. See generally Bloomfield, *Language or Ideas?*, 12 LANGUAGE 89, 93 (1936).

37. RESTATEMENT OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

38. W. QUINE, *The Problem of Meaning in Linguistics*, in FROM A LOGICAL POINT OF VIEW 47, 48-49 (2d ed. rev. 1961).

erence either to the speaker or to the designata of the expressions, but attends strictly to the expressions and their forms (the ways expressions are constructed out of signs in determinate order)."³⁹ For example, having six letters is a syntactical property of 'Holmes'. Lem starts a story: "Trurl the constructor put together a machine that could create anything starting with *n*."⁴⁰ Starting with 'n' is a syntactical property of a thing's name.

Two aspects make the idea of a syntactical property more general. Pieces of language need not look alike to be classified together. For instance, 'N' and 'n' are differently shaped but count as the same letter. Second, significant as reinforcing the idea that a contract can be formed without speaking or writing, what is linguistic should be interpreted broadly. At the extreme, the anthropologist Levi-Strauss includes kinship structures, patterns of familial relations, as linguistic: women are words, which men exchange.⁴¹ Levi-Strauss adds somewhat redemptively: "[W]oman could never become just a sign and nothing more, since even in a man's world she is still a person."⁴²

The first *Restatement* aspired to make being a contract a syntactical property of promises. Regarding consideration, it illustrated:

A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth \$5000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for \$1. B accepts. B's promise to pay \$1 is sufficient consideration.⁴³

To find out if there is consideration for A's promise, one inspects only the pieces of language; the form, 'I will sell Blackacre for \$X', discloses all. What A wishes does not matter. The revised *Restatement*, however, rejects the strictly syntactical test:

A desires to make a binding promise to give \$1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for \$1000 a book worth less than \$1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay \$1000.⁴⁴

Here, contract turns also on what A desires and B knows, so besides

39. R. CARNAP, INTRODUCTION TO SYMBOLIC LOGIC AND ITS APPLICATIONS 79 (1958).

40. S. LEM, THE CYBERIAD 9 (1976).

41. C. LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 496 (rev. ed. 1969).

42. *Id.*

43. RESTATEMENT OF CONTRACTS § 84 comment b, illustration 1 (1932).

44. RESTATEMENT (SECOND) OF CONTRACTS § 71 comment b, illustration 5 (1981). The illustrations are juxtaposed in L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 12 (4th ed. 1981).

isolating a token of 'I will sell X book for $\$Y$ ', these must be inquired into.

Schematically, a purely syntactical theory of contract would consist of sentences like:

If what A says has the same shape as what B says, modulo 'offer' for 'accept', there is a contract.

What A says and what B says are tokens whose sameness is a syntactical property that goes to their classification as types.

Holmes sometimes presumed this theory, most conspicuously in his lecture *The Path of the Law*, where he said the existence of a contract depends on "agreement of two sets of external signs," and spoke of a sign as sometimes something "tangible, for instance, a letter."⁴⁵ Gilmore recognized that this strictly objective theory cannot succeed in the face of *Raffles*, and that Holmes therefore could not adhere to it. The parties to *Raffles* said the same thing syntactically, that is, 'Peerless'. If this alone mattered, *Raffles* and *Wichelhaus* would have contracted; but they did not.

III.

Blanshard speculates how various writers would restate 'He was hanged': 'He was hanged' (Swift, Macaulay, Shaw); 'He was killed' (Bradley); 'He died' (Bosanquet); 'His mortal existence achieved its termination' (Kant); and, concluding the series, 'A finite determination of infinity had been further determined by its own negation' (Hegel).⁴⁶ Evidently, for Blanshard, Hegel provides a paradigm of unobtrusive thought and prose. But Blanshard remarks elsewhere that Wittgenstein "has the strange distinction of having produced a work on logic [the *Tractatus*⁴⁷] beside which the *Logic* of Hegel is luminously intelligible."⁴⁸

In sections 5.54 et seq. of the *Tractatus*, Wittgenstein investigated sentences of the form ' A believes that p ', which apparently relate a person (A) to a proposition (p). "But it is clear," he said, coming to the obscure part, that they "are of the form ' p ' says p "; "[t]his shows that there is no such thing as the soul"⁴⁹

45. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

46. B. BLANSHARD, ON PHILOSOPHICAL STYLE 31 (1954).

47. L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (1922).

48. B. BLANSHARD, REASON AND ANALYSIS 120 (1962).

49. L. WITTGENSTEIN, *supra* note 47, at §§ 5.54-5.421. 'Seele' is translated 'soul' here but

Blanshard⁵⁰ explains that Wittgenstein in these sections was motivated by two overlapping concerns. First, he wanted to avoid positing mental entities such as beliefs, these being unobservable. Gilmore, of course, explained that Holmes shared this concern by restricting inquiry about contract to externals, not intentions and beliefs.⁵¹

Second, less familiarly, Wittgenstein wanted language to be extensional. A linguistic entity composed of others, such as a sentence, is extensional if what it refers to is a function only of what its parts refer to. Names interpreted extensionally refer to individuals: 'Wichelhaus' refers to Wichelhaus. They are interpreted nonextensionally (intensionally) in terms of their meanings.⁵² Sentences refer to truth values: T or F. One may interpret 'It is not the case that Peerless sails tomorrow' extensionally, because the complete sentence refers to T if its embedded sentence, 'Peerless sails tomorrow', refers to F, and conversely. But superficially, as Wittgenstein said, a sentence such as 'Wichelhaus believes that Peerless sails tomorrow', which has the form 'A believes that *p*', is intensional. Its truth value seems not a function of the truth value of its embedded sentence: whether Peerless sails tomorrow or not, Wichelhaus may or may not believe that it will.

Therefore, according to Blanshard, Wittgenstein told us to read 'Wichelhaus believes that Peerless sails tomorrow', as equivalent to 'Wichelhaus says, 'Peerless sails tomorrow'', which has the unproblematic parts 'Wichelhaus', referring to Wichelhaus, and 'Peerless sails tomorrow', referring to a sentence token. The substituted sentence's truth value, what it refers to, is a function of what these expressions refer to; hence we may interpret it extensionally.

Gilmore discussed Holmes' argument satirically. Blanshard's attitude and style are strikingly like Gilmore's. Blanshard, introducing Wittgenstein's analysis, asks, "How was the philosopher to escape from the dreadful abyss [of nonextensionality] that thus opened at his feet?"⁵³ Blanshard answers, incredulous:

might be translated 'mind'. S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 48 n.31, 127 n.11, 130-31 n.12, 133 (1982).

50. B. BLANSHARD, *supra* note 48, at 197-205. Interpretations of §§ 5.54-.5421 besides Blanshard's include, classically, Ramsey, *Review of 'Tractatus'*, in *ESSAYS ON WITTGENSTEIN'S Tractatus* 9, 13 (I. Copi & R. Beard 1966); and, recently, Dayton, *Tractatus* 5.54-5.5422, 6 *CAN. J. PHIL.* 275 (1976); Ishiguro, *Representation: An Investigation Based on a Passage in the Tractatus*, in *FORMS OF REPRESENTATION* 189 (B. Freed, A. Marras & P. Maynard eds. 1975).

51. See *supra* text accompanying note 18; G. GILMORE, *supra* note 9, at 20.

52. D. LEWIS, *Tensions*, in 1 *PHILOSOPHICAL PAPERS* 250 (1983).

53. B. BLANSHARD, *supra* note 48, at 202.

[Wittgenstein] saw that he could save himself and this precious jewel of the extensionalist logic if he could deny that in referring to the proposition believed by [Wichelhaus] he was referring to a proposition at all. This he did. What he was really asserting, he suggested, was not that [Wichelhaus] believed the proposition P, but that he *said* P; that is, he uttered the words of the sentence. The inexorable demands of logic were thus triumphantly met. The assertion made no claim beyond the strictly empirical one that [Wichelhaus's] body was issuing certain noises, and these could be directly verified. The relief to the philosopher's mind may be imagined when this solution came into sight. He had saved the doctrine about compound propositions, and he had achieved it at no greater cost than that of the archaic and indefensible dogma that other people have desires and beliefs.⁵⁴

Holmes on *Raffles* and the teaching of the *Tractatus* are remarkably alike. Also, compare Holmes' insistence that the parties in *Raffles* not merely meant but said different things with the *Tractatus*' analysis of the 'green's in '(Mr.) Green is green': "[T]hese words do not merely have different meanings: they are *different symbols*."⁵⁵ We come tantalizingly close to explaining the similarities between Holmes and Wittgenstein by the American philosopher Peirce influencing both.

Peirce and Holmes belonged to the Metaphysical Club, which met in Boston and Cambridge between 1770 and 1872 for philosophical conversation.⁵⁶ Peirce wrote the characteristic essay *How to Make Our Ideas Clear*⁵⁷ "lest the club should be dissolved, without leaving any material *souvenir* behind."⁵⁸

For Blanshard, Wittgenstein's *Tractatus* is partly an unclear extension of *How to Make Our Ideas Clear*.⁵⁹ Peirce, however, influenced Wittgenstein predominately or exclusively through the Cambridge University philosopher Ramsey.⁶⁰ Ramsey helped translate the *Tractatus* from its original German, but did not meet Wittgenstein until 1923, the year following publication of the

54. *Id.* (footnote omitted).

55. L. WITTGENSTEIN, *supra* note 47, at § 3.323.

56. See generally Speziale, *By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law*, 9 MANITOBA L.J. 29 (1978); Note, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

57. C. PEIRCE, *How to Make Our Ideas Clear*, in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE §§ 5.388-410 (1934).

58. C. PEIRCE, *Preface* to 5 COLLECTED PAPERS § 5.13 (1934).

59. B. BLANSHARD, *supra* note 48, at 197.

60. Bambrough, *Peirce, Wittgenstein, and Systematic Philosophy*, 6 MIDWEST STUD. PHIL. 263 (1981).

Tractatus, and did not have the "innumerable conversations" that presumably acquainted Wittgenstein with Peirce until 1929.⁶¹

IV.

Of Raffles and Wichelhaus, Holmes contended, and Gilmore denied, that "each said a different thing."⁶² Ordinarily, 'said' equals 'uttered' or 'spoke'. This is Gilmore's use of 'said', the syntactical use already discussed,⁶³ by which speakers say different things by saying tokens of different types. By this use, Raffles and Wichelhaus said the same thing, tokens of 'Peerless'; therefore, Holmes' contention was false. Nevertheless, as previously argued, it is unlikely Holmes was dissembling, or mistaken at the elementary level at which Gilmore perceives error.

Of course, Holmes' use of 'said' may simply be deviant. Imagine, then, Holmes used 'said' extraordinarily or idiosyncratically. What he said would have been true, or not obviously false. Contrast Gilmore's ordinary syntactical 'said' ('said₁') with 'said' as Holmes hypothetically used it ('said₂'). The first constraint on 'said₂' is that it must solve *Raffles*: distinguish between tokens of 'Peerless' as 'said₁' does not. The second constraint is that it must not, as does 'meant', make subjective, nonexternal distinctions.

As observed, 'said₁' distinguishes among expressions syntactically. Ordinarily, one contrasts syntax and semantics. Semantical properties are specified by talking about "designata" of the expressions—"objects, properties, states of affairs, or the like."⁶⁴ That 'Peerless sails tomorrow' refers to T and that 'Wichelhaus' refers to Wichelhaus are semantical properties of those expressions.

Hence the obvious distinction to make is that 'said₁' is syntactical; 'meant' is semantical. We know 'said₂' like 'meant' distinguishes expressions semantically. Gilmore was indisputably right that Raffles and Wichelhaus spoke identically syntactically. According to Holmes—whose use of 'said' governs 'said₂'—the parties said different things. Then 'said₂' is distinguished from 'said₁' by being semantical not syntactical; and from 'meant' by something within semantics.

61. L. WITTGENSTEIN, *LETTERS TO C. K. OGDEN* app. 77, 87 (1973) (quoting L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* at x (3d ed. 1953)).

62. O.W. HOLMES, *supra* note 2, at 309.

63. See *supra* text accompanying note 39.

64. R. CARNAP, *supra* note 39, at 79.

The contemporary philosopher Quine distinguishes between reference and meaning thus:

[T]here is a gulf between *meaning* and [*reference*] even in the case of a singular term which is genuinely a name of an object The phrase 'Evening Star' [refers to] a certain large physical object of spherical form, which is hurtling through space some scores of millions of miles from here. The phrase 'Morning Star' [refers to] the same thing, as was probably first established by some observant Babylonian. But the two phrases cannot be regarded as having the same meaning; otherwise that Babylonian could have dispensed with his observations and contented himself with reflecting on the meanings of his words. The meanings, then, must be other than the [referred to] object, which is one and the same in both cases.⁶⁵

The "gulf" Quine identifies is substantial: "When the cleavage between meaning and reference is properly heeded, the problems of what is loosely called semantics become separated into two provinces so fundamentally distinct as not to deserve a joint appellation at all."⁶⁶ The salience of this division suggests we adopt it to distinguish 'said₂' and 'meant'. Then, tentatively, 'said₂' relates to reference, 'meant' to meaning.

Meaning is interpretable as what decides reference. Accordingly, 'the morning star' would mean the last star visible at dawn; one knowing this can pick out the morning star. Alternatively, meaning is interpretable as the pattern of references across contexts, by which 'the morning star' refers to planet *A* here, to planet *B* in different circumstances, and so forth. Being syntactical, 'said₁' is extensional by default; 'said₂' is still extensional, although semantical, not syntactical; and 'meant' is both semantical and intensional.

The morning/evening star is, of course, Venus.⁶⁷ Imagine a one-Peerless analogue of *Raffles*. Regard these functional equivalences:

'Venus' = 'Peerless'

'Evening Star' = 'Peerless, sailing in December'

'Morning Star' = 'Peerless, sailing in October'

In the analogue, there is only one ship as there is only one star. Both litigants said 'Peerless'; they referred to the same ship (by hypothesis,

65. W. QUINE, *On What There Is*, in *FROM A LOGICAL POINT OF VIEW* 1, 9 (2d ed. rev. 1961).

66. W. QUINE, *Notes on the Theory of Reference*, in *FROM A LOGICAL POINT OF VIEW* 130, 130 (2d ed. rev. 1961).

67. The example is from G. FREGE, *On Sense and Reference*, in *TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLLOB FREGE* 56, 57 (1952).

there is only one). Raffles said 'Peerless' meaning by it what 'Peerless, sailing in December' means; Wichelhaus said 'Peerless' meaning by it what 'Peerless, sailing in October' means. Hence one or both parties mistook when Peerless sailed. By Holmes' reading of *Raffles*, the parties in the analogue contracted. That they said₁ identically or that they meant differently does not matter; that they said₂ identically does. This difference regarding said₂ causes the disparate results in the analogue and in *Raffles*.

Holmes had to cut up the world as finely as did the *Raffles* court. The resources of 'said₁' did not let Holmes decide both *Raffles* and its one-Peerless analogue: syntactically, Raffles and Wichelhaus said the same thing, tokens of the type 'Peerless'. Holmes, supplementing 'said₁' with 'said₂', could make not only syntactical but also semantical distinctions; consequently, he could have Raffles and Wichelhaus say different things. Tokens of the syntactical type 'Peerless' might be distinguished as referring to different ships. In *Raffles*, the tokens did, hence the parties did not contract. In the hypothetical one-Peerless analogue, the tokens of 'Peerless' identically refer to this ship. The parties said the same thing in the sense of 'said₂', and contracted.

Holmes, using 'said₁' and 'said₂', could divide the world into as many pieces as the *Raffles* court did, distinguishing among facts as completely. He did not need 'meant', did not need to talk nonextensionally. That *Raffles* and Wichelhaus might have meant different things would not have mattered. Holmes by explaining the law with 'said₂' instead of 'meant' made the law speak extensionally, as Wittgenstein wanted.⁶⁸ The table below sums up the distinctions made in this Part of the paper.

semantical	{	meant	}	intensional
		said ₂		extensional
syntactical		said ₁		

V.

Holmes wrote to Pollock in 1898, unpromisingly, from our perspective: "[A] proper name means only one person or thing though it may *idem sonans* with another proper name, & you let in intent not to

68. See *supra* text accompanying note 52.

find out what the speaker meant but what he said.”⁶⁹ Holmes’ sentence is nevertheless consonant with, or restates, the theory of Part IV, if the boldface expressions are disambiguated or translated.

‘means’ = ‘said₂’ (the relation between a name and a thing named is reference)⁷⁰

‘*idem sonans*’ (sounding the same) = ‘identical said₁’ (hearing having replaced seeing as the representative mode of perception)

‘meant’ = ‘meant’

‘said’ = ‘said₂’

Thus reformulated, the quoted passage goes:

A proper name says₂ only one person or thing though it may say₁ the same thing as another proper name, & you let in intent not to find out what the speaker meant but what he said₂.

Holmes’ letter to Pollock, thus translated, speaks as Part IV suggests regarding reference and meaning; but insofar as Holmes admits talk about intent at all, Part IV’s theory is still in trouble. Moreover, Holmes did not write the passage inadvertently; or if he did, he wrote thus more than once. Elsewhere, Holmes said, citing *Raffles*, we “let in evidence of intention,” we “inquire what” a writer “meant,” not because this matters for itself, but “in order to find out what he has said.”⁷¹

We must grasp the magnitude of the problem. Holmes wanted contract to depend only on externals, to be independent of mental things. Correspondingly, Wittgenstein wanted the world to consist only of observable things talked about extensionally. The distinctions ‘said₁’ makes are external in Holmes’ sense, observable in Wittgenstein’s; those ‘meant’ makes are not: so far so good. The trouble is about whether the distinctions ‘said₂’ makes are external or observable. If we admit intent to determine reference, reference has a mental aspect.

It appears we do admit it. In *Raffles*, how did the parties, having identically said ‘Peerless’, refer to different ships, unless by thinking of different ships, intending to refer to different ships, having different ships in mind? Holmes’ program to objectify contract law collapses

69. Letter from Oliver Wendall Holmes to Frederick Pollock (Dec. 9, 1898), reprinted in 1 HOLMES-POLLOCK LETTERS 89, 90 (M. Howe ed. 1941).

70. See *supra* text accompanying note 65.

71. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899).

to the extent reference depends on the intent to refer, and he might as well have talked immediately about what the parties meant.

Trurl's machine⁷² could create nonlinguistic things whose names begin with 'n'. The tension in the idea of the machine comes from its syntactical criterion for creating, coupled with the extensional semantical naming relation with what it creates. So far, Holmes' objective theory of contract has a like tension. Its test for contract is referential, thus extensional; but a judge must do intensional semantics to locate the referent.

To see how partly to remove this impediment, pretend that *Raffles* had come before the court having a different procedural posture: that Milward, for Raffles, instead of demurring to Wichelhaus' plea that the parties "meant and intended" different ships, joined issue with Wichelhaus over the plea's factual claim (insofar as it was a factual claim).⁷³ Contemplate Wichelhaus' problem of proof.

It is hard to get the proof off the ground. Possibly, but improbably, Wichelhaus would not have been permitted to testify about what he intended to refer to. Wigmore makes and then disapproves of this argument for exclusion, embraced avidly only in Alabama:

[S]ince a person's own intention can be known only to himself, his statement of what it is or was cannot be safeguarded by the possibility of exposing its falsity, through the aid either of conflicting circumstances or of opposing eyewitnesses; . . . thus the influence of self-interest in falsifying is too dangerous, and . . . such testimony should consequently be forbidden.⁷⁴

A report by a witness of his mental state, if admissible, is unpersuasive. At best, Wichelhaus would have impressed no one by merely testifying, 'I referred to October Peerless'.

The testimony on Wichelhaus' behalf must be about externals, proceeding roughly as follows:

Q. What ship did you mean and intend?

Wichelhaus. October Peerless.

72. S. LEM, *supra* note 40, at 11. See 1 HOMER, *THE ODYSSEY* 144 (2d ed. W. Stanford 1959). Fischer reports a parallel instance of confusion within semantics: "Witness the legendary Ming emperor who dealt with a dangerous river by a sort of semantical flood control project. Instead of building dikes and dams, he changed its name from 'The Wild One' to 'The Peaceful One'." D. FISCHER, *HISTORIANS' FALLACIES* 22 (1970) (quoting H. KONIGSBURGER, *LOVE AND HATE IN CHINA* 9 (1966)).

73. 2 H. & C. at 906, 159 Eng. Rep. at 375. Milward's litigation strategy is discussed in G. GILMORE, *supra* note 9, at 35-39.

74. 7 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1965, at 141 (rev. ed. 1978).

Q. How do we know this?

Wichelhaus. I saw a schedule that referred to the ship; I never heard of December Peerless.

.

Q. How do we know that October Peerless was referred to by this schedule, and not December Peerless?

Publisher of schedule. I got my information about sailing dates directly from the owner of October Peerless. I never heard of December Peerless.

.

Q. How do we know the information about sailing dates the publisher of the schedule got from you referred to October Peerless?

Owner. October Peerless is my ship. My daughter christened it. I never heard of December Peerless.

.

Daughter. . . . And then I swung this bottle at this boat, and said, "I name you 'Peerless'."

Compare this mode of proof to the causal theory of reference, adapted to the context of *Raffles*:

[A ship is christened; its owners call it] by a certain name. They talk about [it] to their friends. Other people meet [it]. Through various sorts of talk the name is spread from link to link as if by a chain. A speaker who is on the far end of this chain . . . may be referring to [Peerless] A certain passage of communication reaching ultimately to the [ship itself] does reach the speaker [A] chain of communication going back to [Peerless] has been established, by virtue of [its] membership in a community which passed the name on from link to link⁷⁵

The links of the chain discussed above are physical objects. An intermediate link of the chain is caused by the preceeding link and causes the succeeding link. The first link is the physical object being referred to; the last link is the piece of language that does the referring.

It is striking that the form of the legal proof and the causal theory of reference are congruent, the proof working backward along the causal chain that the theory posits and depends on. *Raffles* involved two causal chains. One chain ran from October Peerless through 'I christen you 'Peerless' ' to 'I promise to buy cotton ex Peerless' (said by Wichelhaus); the other ran from December Peerless through 'I christen you 'Peerless' ' to 'I promise to sell cotton ex Peerless' (said by Raffles).

75. S. KRIPKE, NAMING AND NECESSITY 91 (1980). About Kripke, see generally Branch, *New Frontiers in American Philosophy*, N.Y. Times, Aug. 14, 1977, § 6 (Magazine), at 12.

VI.

Holmes' theory of contract formation then consists not of unqualifiedly syntactical sentences like:

If what *A* says₁ is the same as what *B* says₁, . . . there is a contract.

These are familiar from Part II. Syntax alone is insufficient. Consequently, the theory contains extensional semantical sentences such as:

If what *A* says₂ is the same as what *B* says₂, . . . there is a contract.

One may translate the second sentence thus using 'said₁' and reference:

If what *A* says₁ is the same as what *B* says₁ . . . *and* if what *A* and *B* say₁ refer to the same things, there is a contract.

Here 'refer to the same things' is analyzed as 'be at the ends of causal chains going back to the same things'.

From the vantage point of the causal theorist, the subjective, psychological aspects of contract law are supplemental and insignificant. Cause is believed to work exclusively by physical contact.⁷⁶ In general, however, the links in a causal chain from an object to a token of its name are not temporally and spatially contiguous. For example, in Part V, the token 'Peerless' in the schedule of sailings caused Wichelhaus to say 'Peerless' to Raffles elsewhere later. Thoughts provide the causal continuity. Typically, by the resulting theory, a token of 'Peerless' causes a thought at time and place *a*. The thought persists to time and place *b*, where it causes a succeeding token of 'Peerless'.

In two respects, Holmes' theory is incomplete. First, it fails where causal chains run from both ships to the tokens of both litigants, because then no test by externals conclusively establishes which ship caused the saying of a given token. Perhaps the difficulty here is just epistemological, that is, with what we know, in which case the causal relation which determines reference is obscured, but exists. Worse, the relation of reference itself may fail as a physical relation, as it would if whether the litigants referred to the same ship depended on their "intending to use the same reference."⁷⁷ Either way, the very objectivity that is the virtue of Holmes' theory is lost.

76. D. HUME, A TREATISE OF HUMAN NATURE 75 (2d ed. L. Selby-Bigge 1978) (1st ed. London 1739).

77. S. KRIPKE, *supra* note 75, at 97.

Second, whether or not an expression refers is sometimes decided outside Holmes' theory. Deceptively, some apparently referring pieces of language have nothing to refer to. Trurl's⁷⁸ trouble occurred because his machine started to create nothing—'nothing' begins with 'n'—and "after a while the world very definitely began to thin out around Trurl."⁷⁹ Here the machine creates nothing, yet 'nothing' fails to refer.

Consider this one-ship analogue to *Raffles*. *Raffles* and Wichelhaus say₁ 'Peerless, sailing in October', or 'Peerless' unaugmented, meaning by this what 'Peerless sailing in October' means. There is, however, only one Peerless, which sails in December. Maybe the parties have contracted, maybe not. We may *state* the test for their having contracted speaking only about reference: either the tokens of 'Peerless' refer to Peerless, the parties mistaking a property of the ship, in which case they contracted; or, nothing being both Peerless and sailing in October, the tokens fail to refer to anything, in which case they did not contract.

This is fine; which alternative is the case, however, is determined by how important the ship's sailing date is, thus subjectively. The problem, stated in the language of the causal theory, is whether the putative causal chains or the parties' misapprehensions of the sailing date caused the tokens 'Peerless'. Addressing this problem, we likely do intensional semantics to determine reference, thus encountering the law of mutual mistake or frustration.⁸⁰

VII.

Gilmore had Holmes argue: 'It is possible to explain *Raffles* objectively. Of course, it can be explained subjectively too; however, a subjective explanation is inconvenient, because businessmen must decide by externals'.⁸¹ The clause 'Of course . . .', imputed to Holmes, which concedes the sufficiency of the subjective theory, underestimates the force of Holmes' argument, which need not depend on the relative convenience of competing successful explanations. Holmes, instead, may be interpreted to argue that the subjective theory not

78. See *supra* text accompanying notes 40 and 72.

79. S. LEM, *supra* note 40, at 6.

80. This is a problem for another day, best approached through *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

81. See *supra* text accompanying note 18.

only is unnecessary, but also is insufficient. That is, reference is *the* required ground to decide contract.

The expression 'subjective theory' equivocates. It may designate a theory of meaning, as it does in Part IV. If, not implausibly, "difference in extension constitutes difference in meaning,"⁸² meaning includes, but goes beyond, reference. Oppositely, 'subjective theory' may designate something purely psychological, a theory that depends exclusively on mental representations. Such a theory would not relate these representations to the world. This latter reading of 'subjective theory' will be considered in Part VII.

As previously observed,⁸³ Holmes wanted a completely syntactical theory of contract, one that decides contract by shapes of language tokens, but could not have it, *Raffles* being a counterexample. In *Raffles*, the parties said the same thing syntactically, 'Peerless', but did not contract. A completely psychological theory of contract fails too, for the same reason. Imagine thought as silent, internal speech: to think Peerless sails tomorrow is to speak to oneself, 'Peerless sails tomorrow'. Expectedly, the parties' subvocalized speech underdetermines contract; that the parties say the same things is inconclusive. Instead, they contract or not depending on the references of what they say.

Consider the identical Hanema twins.⁸⁴ Raffles is acquainted with one, Wichelhaus with the other. Despite the twins' being different individuals, Raffles and Wichelhaus might have detailed identical mental representations of them. For instance, both conceivably think, "a fair soft brown-haired woman, thirty-four, going heavy in her haunches and waist yet with a girl's fine hard ankles and a girl's tentative questing way of moving, as if the pure air were loosely packed with obstructing cloths."⁸⁵

Now, moving to the framework of *Raffles*, hypothesize that Raffles says, 'I'll sell you . . . cotton shipped ex Peerless'; Wichelhaus responds, 'I'll buy . . . cotton from you shipped ex Peerless'; and "the actual state[s] of the parties' minds"⁸⁶ are indistinguishable, as is their syntax:

82. H. PUTNAM, *Computational Psychology and Interpretation Theory*, in 3 PHILOSOPHICAL PAPERS 139, 145 (1983).

83. See *supra* text accompanying notes 28 & 45.

84. The illustration is from J. UPDIKE, COUPLES (1968).

85. *Id.* at 3.

86. O.W. HOLMES, *supra* note 2, at 309.

We may suppose that [Raffles and Wichelhaus] have the same 'mental representation' of ['Peerless'], that they have the same *beliefs* in connection with [Peerless], etc. . . . [I]t would seem that we should say that the content of the mental representation of ['Peerless'] is exactly the same for [Raffles and Wichelhaus] [T]here is nothing 'psychological,' nothing 'in their heads,' which constitutes the difference . . . ; . . . it is in the *reference* of the word, as objectively fixed by the practices of the community, and not in the conceptions of [Peerless] entertained by [Raffles and Wichelhaus].⁸⁷

Again, the parties will have contracted or not, depending on reference, despite both their words and their thoughts being congruent. Their psychology, like their language, is incapable of deciding whether they contract. "If God had looked into our minds," Wittgenstein said, "he would not have been able to see there whom we were speaking of."⁸⁸

Raffles is adequate but not absolute proof that the subjective theory is insufficient. It may be doubted because, as Gilmore observed, the court should have decided the parties agreed any Peerless would do. If 'ex Peerless' meant merely if the ship were lost the contract would end, Raffles losing the cotton, while not responsible to Wichelhaus for not delivering it, 'Peerless' did not refer. This reading is more probable if both parties' mental representations are consistent with either ship.⁸⁹

*Kyle v. Kavanaugh*⁹⁰ clinches the point that the subjective theory is insufficient. In *Kyle*, the parties might have known the properties only under the description 'on Prospect Street'. The contents of their thoughts would have been identical, without respect to which property these thoughts were about. But the parties in *Kyle* had to contract concerning *some* specific property, or not at all.

CONCLUSION

According to the teaching criticized, Holmes replaced the sufficient subjective theory of contract formation by the objective theory, which decides contract by observables, but is inconsistent with the case law (*Raffles*). It has been shown there is no simple subjective-objective dichotomy. Instead, the analysis has distinguished four theories.

87. H. PUTNAM, *supra* note 82, at 144-45.

88. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 217 (3d ed. 1958).

89. See G. GILMORE, *supra* note 9, at 35-39.

90. See *supra* text accompanying notes 23-26.

(1) *Syntactical*.—Signalled by 'said₁'. By (1), the most objective, parties contract if their language tokens are congruent. *Raffles* refutes this theory (*Kyle* does too). Parties who speak identically syntactically, who, for example, both say 'Peerless', need not contract.

(2) *Referential*.—Signalled by 'said₂'. By (2), semantical, not syntactical, parties contract if their language tokens refer to the same things. But it is extensional, and explains *Raffles*: the parties' tokens 'Peerless', syntactically identical, referred to different ships. If the causal theory of reference succeeds, (2) depends on observables.

(3) *Meaning-Based*.—Signalled by 'meant'. By (3), the parties contract if, say, their language tokens have the same patterns of references across possible situations. This theory is, like (2), semantical. Yet it is also intensional. It too explains *Raffles*, if only because it subsumes (2). But it makes excessive, impractical distinctions.

(4) *Psychological*.—Perhaps also signalled by 'meant'. By (4), parties contract if they think identically. (4) is the subjective counterpart of (1), thought replacing language. It is equally insufficient: parties can think identically, exactly as they can speak identically, without contracting.

All that survives of *Gilmore's* teaching is that *Holmes* replaced one theory by another, better at deciding by observables. Of the four theories, *Holmes* adopted (2), the referential theory of contract formation, at once adequate, as (1) and (4) are not, and minimally so, as (3) is not.